Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

ITZHAK SHALOM and DAVID MORDEHAI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

1. Whether, in light of *Harris v. United States*, 122 S.Ct. 2406 (2002), and *Ring v. Arizona*, 122 S.Ct. 2428 (2002), acquitted conduct may dramatically increase a sentence so that a district judge may constitutionally sentence defendants who have been acquitted by a jury on 17 of 19 substantive counts of transportation of stolen property as if they had been found guilty on all 19 counts.

2. Whether defendants who were found guilty on only 2 of 19 counts of transporting stolen property and otherwise purchased the overwhelming volume of their merchandise from lawful sources may have their sentences enhanced under § 2B1.1(b)(4)(B) of the *Sentencing Guidelines* on the ground that they are "in the business of buying and selling stolen merchandise."

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No. 02-____

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SUPREME COURT OF THE UNITED STATES

ITZHAK SHALOM AND DAVID MORDEHAI,

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the court of appeals (*Mordehai v. United States*, 2002 WL 833351 (11th Cir. April 19, 2002); *Shalom v. United States*, 2002 WL 833330 (11th Cir. April 19, 2002)) (Pet. App. A, pp. 1a-13a, *infra*) are not reported. The oral explanation of the sentences imposed by the district court (Pet. App. B. pp. 14a-16a, *infra*) is not reported.

JURISDICTION

The court of appeals affirmed the petitioners' convictions on April 19, 2002. Timely petitions for rehearing and for rehearing en banc were denied on June 18, 2002 (Pet. App. C, pp. 17a-22a, *infra*). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The *Federal Sentencing Guidelines Manual* (2000 ed.) § 2B1.1(b)(1) and § 2B1.1(b)(4)(B) provide as follows:

> **§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving,** Transporting, Transferring, Transmitting, or Possessing Stolen Property
>
> (b) Specific Offense Characteristics
>
> (1) If the loss exceeded $100, increase the offense level as follows:

Loss (Apply the Greatest)		Increase in Level
(A)	$100 or less	no increase
(B)	More than $100	add **1**
(C)	More than $1,000	add **2**
(D)	More than $2,000	add **3**
(E)	More than $5,000	add **4**
(F)	More than $10,000	add **5**
(G)	More than $20,000	add **6**
(H)	More than $40,000	add **7**
(I)	More than $70,000	add **8**
(J)	More than $120,000	add **9**
(K)	More than $200,000	add **10**

(L)	More than $350,000	add **11**
(M)	More than $500,000	add **12**
(N)	More than $800,000	add **13**
(O)	More than $1,500,000	add **14**
(P)	More than $2,500,000	add **15**
(Q)	More than $5,000,000	add **16**
(R)	More than $10,000,000	add **17**
(S)	More than $20,000,000	add **18**
(T)	More than $40,000,000	add **19**
(U)	More than $80,000,000	add **20**.

§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

(b) Specific Offense Characteristics

> (4)(B) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **4** levels.

STATEMENT

Petitioners owned "Ideal Closeout," a retail outlet in Maryland that purchased liquidation or surplus merchandise for resale to consumers. Among many suppliers from whom petitioners bought pharmaceutical merchandise was an Atlanta dealer who was found by an FBI undercover operation to be buying goods that had been shoplifted from Target, Wal-Mart, K-Mart and other chain stores in the Southeast. The Atlanta dealer alleged, as part of a plea bargain, that some of his customers, including the petitioners, knew that they were purchasing stolen

merchandise. The petitioners denied such knowledge and, in their defense, pointed to the fact that the appearance of the goods they purchased was the same as other "close-out" merchandise and that the purchases were routine open business transactions, including invoices and payments by check.

The petitioners and 24 other customers were indicted on the testimony of the Atlanta dealer in a 214-count indictment. Petitioners were named in counts 143-162, which charged them with conspiracy to transport stolen property in interstate commerce and with 19 substantive counts of transportation of stolen goods in interstate commerce (18 U.S.C. § 2314), and in counts 187-214 with conspiracy to launder money and 27 counts of money laundering (18 U.S.C. § 1956(h)).

After a 6-day jury trial and two days of deliberation, petitioners were acquitted by the jury on all 28 counts relating to money-laundering and on 17 of the 19 counts charging transportation of stolen property. They were found guilty by the jury on two stolen-property counts and, as a consequence, of conspiracy to transport stolen property.

The goods that were the subject of the two stolen-property counts on which the jury returned guilty verdicts were valued, without opposition from the government, at less than $40,000. For sentencing purposes, the district judge included in the "loss computation" all the allegedly stolen merchandise that was the subject of the 17 counts on which the petitioners had been found not guilty by the jury.[1]

---

[1] The district judge added all the payments the petitioners ever made to the Atlanta dealer, which he found to exceed $780,000, and doubled that amount to reflect the retail price of the goods allegedly stolen. Various challenges to this calculation were rejected by the courts below.

Accordingly, he calculated the total loss under *Sentencing Guidelines* § 2B1.1(b)(1) as exceeding 1.5 million dollars. The judge also imposed a four-level enhancement under § 2B1.1(b)(4)(B) of the *Sentencing Guidelines* on the ground that the defendants were "in the business of buying and selling stolen merchandise." This produced a 10-level increase in the *Sentencing Guidelines* Offense Level, so that petitioners were sentenced as Level 21 offenders rather than Level 11 offenders. The district judge said:

> The Court: Having heard oral argument on the 14-level enhancement as well as the amount of the loss pursuant to paragraph 71 of the presentence report, the court hereby resolves this issue in favor of the government and against the defendant because the government did establish by a preponderance of the evidence during the trial that the acts which the defendant was acquitted were committed by the defendant from May 1998 through August 1999.
>
> As to the amount of loss that is reflected in the presentence report, that the defendant sent approximately 800 thousand dollars to the coconspirators for stolen merchandise and this amount represented half the retail value of the stolen items; therefore, the original retail value would have exceeded $1500.
>
> We are now ready to move to the next guideline issue.

Mr. Smith: Excuse me, Your Honor. That is 1.5 million.

The Court: 1.5 million? I'm sorry. I thought I said -- let the record reflect that I meant 1.5 million dollars, $1,500,000.

We are now ready to proceed to the second guideline issue.

The district judge also increased the defendants' offense level by imposing the four-level enhancement of § 2B1.1(b)(4)(B). He said:

The Court: Let me see those.

As to this issue, let the record reflect the following:

Given the period of time as well as the regularity with which the defendant purchased stolen goods pursuant to this conspiracy, the court is going to resolve this issue in favor of the government and against the defendant because the government did establish by a preponderance of the evidence at trial that the defendant was in the business of receiving and selling stolen goods; therefore, the court will allow the four-level enhancement to stand.

The court of appeals affirmed the sentences on the ground that "[a] sentencing court is permitted to consider acquitted conduct when imposing sentences and may rely on facts that are established by a preponderance of the

evidence." Pet. App. A. pp. 2a-3a, 11a, *infra*. Acknowledging that there is a "split" in the Circuits on the construction of the "in the business" enhancement, the court of appeals approved the enhancement based, *inter alia*, on the "regularity" of petitioners' purchases of stolen goods and the "value and size" of the stolen property. Pet. App. A, pp. 3a-4a and 12a-13a, *infra*.

REASONS FOR GRANTING THE WRIT

Petitioners are Maryland businessmen who had spotlessly clean records prior to the allegation, which they vigorously contested, that they knowingly purchased stolen goods from an admitted Atlanta "fence." Rather than receiving a Level 11 sentence in "Zone C" under the *Sentencing Guidelines* -- the sentence authorized by the jury's verdict -- they have now begun serving a 41-month sentence only because the district judge sentenced them as if they had been found guilty by the jury on all 19 charges of transporting stolen merchandise. The sentence imposed on the petitioners violates the governing principles articulated by this Court in its very recent decisions in *Harris v. United States*, 122 S.Ct. 2406 (2002), and *Ring v. Arizona*, 122 S.Ct. 2428 (2002), and in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The legal issue presented by this case was foreshadowed and reserved in *United States v. Watts*, 519 U.S. 148, 156 (1997), when the Court observed, in its *per curiam* summary reversal, that "relevant conduct that would dramatically increase the sentence" might be subject to a different rule than the Court's majority applied in that case.

I.

THIS COURT HAS HELD THAT A CRIMINAL DEFENDANT MAY NOT BE SENTENCED TO LONGER IMPRISONMENT THAN IS "AUTHORIZED BY THE JURY'S GUILTY VERDICT."

This Court's decisions in *Harris v. United States*, 122 S.Ct. 2406 (2002), and *Ring v. Arizona*, 122 S.Ct. 2428 (2002), confirmed the constitutional rule established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict" must be decided by the jury beyond a reasonable doubt. *See Harris,* 122 S.Ct. at 2414; *Ring,* 122 S.Ct. at 2432. The sentences imposed on the defendants in this case clearly exceeded what would have been warranted by the jury's verdict of guilty on two counts involving less than $40,000.

In its plurality opinion in *Harris*, the Court emphasized that, to be constitutional, the sentence imposed on a criminal defendant must be "[w]ithin the range authorized by the jury's verdict." 122 S.Ct. at 2419. The Court quoted the conclusion in *Apprendi* that prohibits imposition on a convicted defendant of a punishment "*exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." 122 S.Ct. at 2417 (quoting *Apprendi*, 530 U.S. at 438) (emphasis in original). Indeed, the majority in *Apprendi* emphasized the importance of the jury's verdict several times in its opinion:

> The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment *and found by the jury*. (530 U.S. at 483, n.10 (emphasis added)).
>
> Despite what appears to us the clear "elemental" nature of the factor here, the relevant inquiry is one not of form, but of effect -- does the required finding expose the defendant to a greater punishment *than that authorized by the jury's guilty verdict*? (530 U.S. at 494 (emphasis added)).

Justices Scalia, Kennedy and Thomas, in their concurring opinions in *Ring v. Arizona*, 122 S.Ct. 2406, 2443, 2445 (2002), also noted the significance of keeping criminal sentences within "what is authorized by the jury's verdict." Justices Scalia and Thomas noted in their opinion that allowing a judge to exceed the jury's verdict with the length of the sentence diminishes the importance of the jury.

These concerns -- expressed in recent decisions of this Court -- are heightened when a judge ignores a jury's acquittal of nearly all the substantive allegations made against a defendant, as the sentencing judge did in this case. Instead of being sentenced for the offenses the jury found -- *i.e.*, transporting less than $40,000 worth of stolen merchandise -- the defendants were sentenced as if they had dealt in almost forty times that amount -- a total of $1.5 million. And based on the judge's conclusion, contrary to the jury's verdict, that the defendants had continuously and repeatedly bought stolen goods, the district judge enhanced their sentences by four levels for being "in the business of buying and selling stolen merchandise." These findings were contrary to the jury's verdict and they increased the petitioners' term of imprisonment by several years.

II.

A "DRAMATIC INCREASE" IN A SENTENCE BASED ON ALLEGATIONS ON WHICH THE JURY ACQUITTED PRESENTS THE ISSUE RESERVED IN *UNITED STATES V. WATTS.*

This Court's *per curiam* opinion in *United States v. Watts*, 519 U.S. 148 (1997), authorized district judges to increase a sentence if they find, by a preponderance of the evidence, the existence of "relevant conduct" notwithstanding a conflicting acquittal by the jury on that factual issue. Justices Stevens and Kennedy dissented from the summary conclusion in *Watts*, and even the Court majority reserved for another day the issue "whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence." 519 U.S. at 156.

This case presents the issue reserved in *Watts* in graphic form. The "relevant conduct" found here by the judge by a preponderance of the evidence was not an aggravating factor in the commission of the offense (such as use of a firearm), but was the very commission by the petitioners of 17 other separate offenses. The jury acquitted the petitioners of having committed these additional offenses, but the judge disregarded the jury's not-guilty verdict on all 17 counts. The effect of the judge's decision was to negate entirely the trial at which the petitioners presented their defense and satisfied the jury that they were not guilty.

III.

THE ISSUE IS IMPORTANT AND RECURRING.

Justice Kennedy said of the issue decided summarily in *Watts* that it is "a question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system." 519 U.S. at 170. In light of the decisions rendered by this Court since *Watts* -- *i.e.*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Harris v. United States*, 122 S.Ct. 2406 (2002); and *Ring v. Arizona*, 122 S.Ct. 2428 (2002), the issue reserved in *Watts* is even more recurrent and more important today than it was in 1997. And even the holding in *Watts* has been cast in doubt by this Court's more recent decisions.

The Ninth Circuit has continued to require clear and convincing evidence for an enhancement that has a dramatic effect on a defendant's sentence. *E.g.*, *United States v. Holmes*, 2002 WL 726494 (9th Cir. April 24, 2002); *see also United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999); *United States v. Mezas de Jesus*, 217 F.3d 638, 642 (9th Cir. 2000). The Seventh and Eighth Circuits have agreed that a clear-and-convincing standard should be used rather than the preponderance-of-the-evidence when the increase in a defendant's sentence is "extreme." *United States v. Anderson*, 259 F.3d 853, 858 (7th Cir. 2001); *United States v. Ofcky*, 237 F.3d 904, 908 (7th Cir. 2001); *United States v. Alvarez*, 168 F.3d 1084, 1089 (8th Cir. 1999). The Third Circuit, which had originated this exception to the general rule in *United States v. Kikumura*, 918 F.2d 1084, 1102 (3d Cir. 1990) (cited in *Watts*, 519 U.S. at 156 n.2), has reiterated it after *Watts*. *E.g.*, *United States v. Mack*, 229 F.3d 226 (3d Cir. 2000).

The legal issue presented by this petition for certiorari -- whether a dramatic increase in a sentence may be

based on alleged criminal acts on which the jury has specifically acquitted the defendant -- will arise frequently in the future. In light of this Court's very recent decisions that emphasize that "the jury's verdict" limits the authority of the sentencing judge, this Court should decide in this case whether the Constitution permits judges effectively to overrule and set aside the verdicts of juries and sentence defendants as if they have been found guilty on all counts even though they have actually been acquitted on most of the charges filed against them.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 2002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-13011

Non-Argument Calendar

D.C. Docket No. 99-00545-CR-20-1-CC

United States of America,

Plaintiff-Appellee,

v.

Itzhak Shalom

Defendant-Appellant.

Appeal from the United States District Court

For the Northern District of Georgia

(April 19, 2002)

Before ANDERSON, Chief Judge, WILSON and FAY, Circuit Judges.

PER CURIAM:

Itzhak Shalom appeals his convictions for interstate transportation of stolen property, in violation of 18 U.S.C.

§§ 2314 and 2, and his sentences of 41 months' imprisonment. We affirm.

On appeal, Shalom first argues that prosecutorial misconduct created significant prejudice, and thus, grounds for reversal. "To find prosecutorial misconduct, a two-element test must be met: '(1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant.' We make this determination in the 'context of the entire trial and in light of any curative instruction.'" *United States v. Wilson*, 149 F.3d 1298, 1301 (11th Cir. 1998) (internal citations omitted). In reviewing alleged prosecutorial misconduct, we evaluate the following factors: (1) the degree to which the statements tended to mislead the jury and to prejudice the accused; (2) whether they are isolated or extensive; (3) whether the statements are deliberate or accidentally made; and (4) the strength of the evidence against the defendant. *Davis v. Zant*, 36 F.3d 1538, 1546 (11th Cir. 1994). We have held that argument is not evidence and can be rectified by instructing the jury that only the evidence in the case can be considered. *United States v. Smith*, 918 F.2d 1551, 1562 (11th Cir. 1990). Because the comments in question were isolated, and any resulting prejudice was cured by the court's instruction to not consider arguments as evidence, we affirm the district court's denial of the motion of new trial.

Second, Shalom contends that the district court applied the wrong evidentiary standard at sentencing and erred in calculating the total loss and in enhancing his sentence under U.S.S.G. § 2B1.1(b)(1) based upon that calculation. The law in this Circuit is clear that evidence used at sentencing must be proven only by a preponderance of the evidence. *United States v. Rivera-Lopez*, 928 F.2d 372 (11th Cir. 1992). A sentencing court is permitted to consider acquitted conduct when imposing sentences and may rely on facts that are established by a preponderance of

the evidence. *Id.* at 372. "A district court's calculation of the amount of the loss is a factual determination reviewed for clear error." *United States v. Menichino*, 989 F.2d 438, 440 (11th Cir. 1993). In calculating the loss, the sentencing court "need only make a reasonable estimate of the loss," U.S.S.G. § 2B1.1 app. note 2, but cannot merely speculate as to the amount of loss. *See United States v. Wilson*, 993 F.2d 214, 218 (11th Cir. 1993) (noting that the district court must not speculate concerning the existence of a fact which would permit a more severe sentence under the guidelines). Because the district court utilized the correct legal standard and the record supports its conclusion, we find no error. The evidence shows a pattern whereby the defendants were purchasing the stolen goods for one-half, or less of its retail value. Doubling the expenditures of the defendants was quite proper in calculating the total loss (retail value).

Third, Shalom argues that the district court erred in applying the "in the business of buying and selling stolen merchandise" enhancement. The Circuits are split on the proper test to apply in determining whether an individual is "in the business," and we have not yet chosen which test to follow. *United States v. Maung*, 267 F.3d 1113, 1118 (11th Cir. 2001). The Fifth, Sixth, and Seventh Circuits apply the "fence" test and ask whether defendant bought and sold stolen property and if that activity encouraged others to commit crimes. (*Id.*) The First, Third, and Ninth Circuits apply the "totality of the circumstances" test and look at a case by case basis placing emphasis on the regularity and sophistication of the operation. (*Id.*) We are also guided by the 2001 Sentencing Guidelines, not used by the sentencing court in this case because Mordehai [sic] was sentenced under the 2000 Guidelines, which contain a non-exhaustive list of four factors that courts should consider in deciding whether to apply the enhancement. *United States v. Howard*, 923 F.2d 1500, 1504 & n.5 (11th Cir. 1991) (noting that amended commentary should be used in reviewing

application of sentencing guidelines, unless it would result in an increased sentence). Those factors include (1) the regularity and sophistication of the activities, (2) the value and size of the inventory of stolen property, (3) the extent to which the business encouraged other crimes, and (4) past activities involving stolen property. U.S.S.G. § 2B1.1 app. n.4 (2001). Because the evidence supported finding that Shalom bought and sold stolen goods under either test or the guideline factor, we find the district court did not err in applying the enhancement.

Fourth, Shalom argues that the district court erred in denying his motion to suppress the evidence from the February 18th search of the United Parcels Service ("UPS") packages. We review the denial of a motion to suppress under a mixed review, reviewing the findings of fact under the clearly erroneous standard and the application of the law to those facts *de novo*. *United States v. Gil*, 204 F.3d 1347, 1350 (11th Cir.), *cert. denied*, 531 U.S. 951 (2000). The Fourth Amendment protects citizens from interference with their possessory interest in property and from infringement of their reasonable expectations of privacy. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). The Supreme Court "has also consistently construed this protection as proscribing only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" *Id.* at 113, 104 S.Ct. 1656 (citation omitted). In determining whether a private party acted on behalf of the government, we consider whether the government knew of the intrusive conduct and whether the private party's purpose in conducting the search was to assist law enforcement agents or to further its own ends. *United States v. Simpson*, 904 F.2d 607, 610 (11th Cir. 1990) (citing *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982)). Because this was

a private search and the agent's actions did not exceed the scope of that private search, we find that the district court did not err in denying the motion to suppress the fruits of the February 18th search. Because this was a private search and the agent's actions did not exceed the scope of that private search, we find that the district court did not err in denying the motion to suppress the fruits of the February 18th search. [sic].

Fifth, Shalom argues that the search of his business exceeded the scope of the search warrant. Unless agents executing a search warrant act "in flagrant disregard of the terms of a warrant, seizure of items outside the scope of the warrant does not affect the admissibility of items properly seized or constitute reversible error no [sic] a direct appeal form [sic] the conviction." *United States v. Lambert*, 887 F.2d 1568, 1572 (11th Cir. 1989). Because trial testimony supported a finding by the court that the agents acted reasonably within the terms of the warrant, we find the court did not err in denying the motion to suppress.

Sixth, Shalom argues that the court erred in admitting hearsay evidence. The determination that a statement was made in furtherance of a conspiracy is a factual finding which will be overturned on appeal only if the finding is clearly erroneous. *United States v. Castelberry*, 116 F.3d 1384 (11th Cir.), *cert. denied*, 522 U.S. 934 (1997). To admit a co-conspirator's statement under the hearsay rule, the government must establish by a preponderance of the evidence that (1) the conspiracy existed; (2) the defendant was a member of the conspiracy; and (3) the co-conspirator's statements were made in furtherance of the conspiracy. *Id.* at 1390-91. Because there is sufficient evidence in the record to support finding that the shoplifters were members of the conspiracy and the conversations were in furtherance of the conspiracy, we affirm the district court's decision to admit the testimony.

Seventh, Shalom argues that the district court committed structural error and violated his Sixth Amendment right to a public trial by partially closing the trial. Violation of the right to a public trial is structural error, not subject to harmless error analysis, and if found, warrants relief. *Judd v. Haley*, 250 F.3d 1308, 1314-15 (11th Cir. 2001). In *Haley*, we recognized a distinction between total closures of a trial and partial closure. *Id.* at 1315. Both total and partial closures require the court to "hold a hearing and articulate specific findings." *Id.* The court must articulate a substantial reason for the partial closure, as opposed to the more stringent test outlined in *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 2215, 81 L.Ed.2d 31 (1984), for a total closure. *Id.* Because there were substantial reasons articulated by the trial court for the minimal partial closure, we find that district court did not err in ordering the partial closure.

Eighth, Shalom adopts the argument of his co-defendant, and argues the evidence was insufficient to support the verdicts. "Accepting all reasonable inferences which support the verdict, we will affirm the conviction if a reasonable trier of fact could conclude that the evidence establishes guilt beyond a reasonable doubt." *United States v. McDowell*, 250 F.3d 1354, 1364-65 (11th Cir. 2001) (citing *United States v. Mieres-Borges*, 919 F.2d 652, 656 (11th Cir. 1990) (quotation marks omitted)). Because there was sufficient evidence in the record for the jury to find Shalom was aware the merchandise was stolen, we affirm.

Upon review of the presentence investigation report, the trial transcript, and the sentencing transcript, and upon consideration of the briefs of the parties, we find no reversible error.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-13958

Non-Argument Calendar

D.C. Docket No. 99-00545-CR-19-1-CC

United States of America,

Plaintiff-Appellee,

v.

David Mordehai

Defendant-Appellant.

Appeal from the United States District Court

For the Northern District of Georgia

(April 19, 2002)

Before ANDERSON, Chief Judge, WILSON and FAY, Circuit Judges.

PER CURIAM:

David Mordehai appeals his convictions for interstate transportation of stolen property, in violation of 18 U.S.C. §§ 2314 and 2, and his sentences of 41 months' imprisonment. We affirm.

On appeal, Mordehai first argues that the district court committed structural error and violated his Sixth Amendment right to a public trial by excluding his son from the courtroom. Violation of the right to a public trial is structural error, not subject to harmless error analysis, and if found, warrants relief. *Judd v. Haley*, 250 F.3d 1308, 1314-15 (11th Cir. 2001). In *Haley*, we recognized a distinction between total closures of a trial and partial closure. *Id.* at *1315.* Both total and partial closures require the court to "hold a hearing and articulate specific findings." *Id.* The court must articulate a substantial reason for the partial closure, as opposed to the more stringent test outlined in *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 2215, 81 L.Ed.2d 31 (1984), for a total closure. *Id.* Because there were substantial reasons articulated by the trial court for the minimal partial closure, we find that district court did not err in ordering the partial closure.

Second, Mordehai argues the district court erred in denying his motion to suppress the evidence from the February 18th search of the United Parcels Service ("UPS") packages. We review the denial of a motion to suppress under a mixed review, reviewing the findings of fact under the clearly erroneous standard and the application of the law to those facts *de novo*. *United States v. Gil*, 204 F.3d 1347, 1350 (11th Cir.), *cert. denied*, 531 U.S. 951 (2000). The Fourth Amendment protects citizens from interference with their possessory interest in property and from infringement of their reasonable expectations of privacy. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). The Supreme Court "has also consistently construed this protection as proscribing only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" *Id.* at 113, 104 S.Ct. 1656 (citation omitted). In

determining whether a private party acted on behalf of the government, we consider whether the government knew of the intrusive conduct and whether the private party's purpose in conducting the search was to assist law enforcement agents or to further its own ends. *United States v. Simpson*, 904 F.2d 607, 610 (11th Cir. 1990) (citing *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982)). Because this was a private search and the agent's actions did not exceed the scope of that private search, we find that the district court did not err in denying the motion to suppress the fruits of the February 18th search.

Third, Mordehai adopts the argument of his co-defendant, Shalom, that the search of their business exceeded the scope of the search warrant. Unless agents executing a search warrant act "in flagrant disregard of the terms of a warrant, seizure of items outside the scope of the warrant does not affect the admissibility of items property seized or constitute reversible error no [sic] a direct appeal form [sic] the conviction." *United States v. Lambert*, 887 F.2d 1568, 1572 (11th Cir. 1989). Because agent trial testimony supported a finding by the court that the agents acted reasonably within the terms of the warrant, we find the court did not err in denying the motion to suppress.

Fourth, Mordehai argues that prosecutorial misconduct created significant prejudice and thus grounds for reversal. "To find prosecutorial misconduct, a two-element test must be met: '(1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant.' We make this determination in the 'context of the entire trial and in light of any curative instruction.'" *United States v. Wilson*, 149 F.3d 1298, 1301 (11th Cir. 1998) (internal citations omitted). In reviewing alleged prosecutorial misconduct, we evaluate the following factors: (1) the degree to which the statements tended to mislead the jury and to prejudice the accused; (2)

whether they are isolated or extensive; (3) whether the statements are deliberate or accidentally made; and (4) the strength of the evidence against the defendant. *Davis v. Zant*, 36 F.3d 1538, 1546 (11th Cir. 1994). We have held that argument is not evidence and can be rectified by instructing the jury that only the evidence in the case be considered. *United States v. Smith*, 918 F.2d 1551, 1562 (11th Cir. 1990). Because the comments were isolated, and any resulting prejudice was cured by the court's instruction to the jury not to consider arguments as evidence, we affirm the district court's denial of the motion of new trial.

Fifth, Mordehai adopts the argument of his co-defendant, Shalom, that the court erred in admitting hearsay evidence. The determination that a statement was made in furtherance of a conspiracy is a factual finding which will be overturned on appeal only if the finding is clearly erroneous. *United States v. Castelberry*, 116 F.3d 1384 (11th Cir.), *cert. denied*, 522 U.S. 934 (1997). To admit a co-conspirator's statement under the hearsay rule, the government must establish by a preponderance of the evidence that (1) the conspiracy existed; (2) the defendant was a member of the conspiracy; and (3) the co-conspirator's statements were made in furtherance of the conspiracy. *Id.* at 1390-91. Because there is sufficient evidence in the record to support finding that the shoplifters were members of the conspiracy and the conversations were in furtherance of the conspiracy, we affirm the district court's decision to admit the testimony.

Sixth, Mordehai argues the evidence was insufficient to support the verdicts. "Accepting all reasonable inferences which support the verdict, we will affirm the conviction if a reasonable trier of fact could conclude that the evidence establishes guilt beyond a reasonable doubt." *United States v. McDowell*, 250 F.3d 1354, 1364-65 (11th Cir. 2001) (citing *United States v. Mieres-Borges*, 919 F.2d 652, 656 (11th Cir. 1990) (quotation marks omitted)). Because there

was sufficient evidence in the record for the jury to find Mordehai was aware the merchandise was stolen, we affirm.

Seventh, Mordehai argues that too great of a burden was placed on his exercise of a right to trial by jury because his sentence was much more severe than a similarly situated defendant's sentence, reached after a plea agreement. We have found that "[t]he State is within its rights in encouraging a guilty plea by offering substantial benefits in return for the plea. The States and the Federal Government are free to abolish guilty pleas and plea bargaining; but absent such action, as the Constitution has been construed in our cases, it is not forbidden to extend a proper degree of leniency in return for guilty pleas." *United States v. Palmer*, 809 F.2d 1504, 1507 (11th Cir. 1987). Mordehai offers no contrary legal precedent, and accordingly, we find his claim to be without merit.

Eighth, Mordehai argues that due process requires that in exceptional cases with disproportionate sentencing enhancements, the sentencing court must utilize a clear and convincing standard. This Court reviews the district court's interpretation of the sentencing guidelines *de novo*, *United States v. Lewis*, 115 F.3d 1531 (11th Cir. 1997), *cert. denied*, 522 U.S. 1066 (1998), and reviews the factual findings at sentencing for clear error. The law in this Circuit is clear that evidence used at sentencing must be proven only by a preponderance of the evidence. *United States v. Rivera-Lopez*, 928 F.2d 372 (11th Cir. 1992). A sentencing court is permitted to consider acquitted conduct when imposing sentences and may rely on facts that are established by a preponderance of the evidence. *Id.* at 372. Because the district court utilized the correct legal standard, we find Mordehai's claim is without merit.

Ninth, Mordehai contends that the district court erred in calculating the total loss and in enhancing his sentence under U.S.S.G. § 2B1.1(b)(1) based upon that calculation.

"A district court's calculation of the amount of the loss is a factual determination reviewed for clear error." *United States v. Menichino*, 989 F.2d 438, 440 (11th Cir. 1993). In calculating the loss, the sentencing court "need only make a reasonable estimate of the loss," U.S.S.G. § 2B1.1 app. note 2, but cannot merely speculate as to the amount of loss. *See United States v. Wilson*, 993 F.2d 214, 218 (11th Cir. 1993) (noting that the district court must not speculate concerning the existence of a fact which would permit a more severe sentence under the guidelines). Because the evidence showed a rather clear pattern of the defendants buying the stolen merchandise for one-half, or less of its marked retail value, there was no error in the trial courts doubling the total amount expended by the defendants in calculating the total loss (retail value of the stolen goods).

Tenth, Mordehai adopts the argument of Shalom, that the district court erred in applying the "in the business of buying and selling stolen merchandise" enhancement. The Circuits are split on the proper test to apply in determining whether an individual is "in the business," and we have not yet chosen which test to follow. *United States v. Maung*, 267 F.3d 1113, 1118 (11th Cir. 2001). The Fifth, Sixth, and Seventh Circuits apply the "fence" test and ask whether defendant bought and sold stolen property and if that activity encouraged others to commit crimes. (*Id.*) The First, Third, and Ninth Circuits apply the "totality of the circumstances" test and look at a case by case basis placing emphasis on the regularity and sophistication of the operation. (*Id.*) We are also guided by the 2001 Sentencing Guidelines, not used by the sentencing court in this case because Mordehai was sentenced under the 2000 Guidelines, which contain a non-exhaustive list of four factors that courts should consider in deciding whether to apply the enhancement. *United States v. Howard*, 923 F.2d 1500, 1504 & n.5 (11th Cir. 1991) (noting that amended commentary should be used in reviewing application of sentencing guidelines, unless it would result in

an increased sentence). Those factors include (1) the regularity and sophistication of the activities, (2) the value and size of the inventory of stolen property, (3) the extent to which the business encouraged other crimes, and (4) past activities involving stolen property. U.S.S.G. § 2B1.1 app. n.4 (2001). Because the evidence supported finding that Mordehai bought and sold stolen goods under either test or the guideline factor, we find the district court did not err in applying the enhancement.

Eleventh, Mordehai argues that a seizure warrant must be based on direct evidence that the property, a bank account in this case, contained the proceeds of at least one illegal transaction in violation of 18 U.S.C. § 1956. We have held that "[i]n civil forfeiture actions under § 881(a)(6), [dealing with forfeiture in cases involving drugs,] the government must demonstrate only "probable cause for belief that a substantial connection exists between the property to be forfeited and the criminal activity defined by the statute.'" *United States v. Carrell*, 252 F.3d 1193, 1200 (11th Cir. 2001); *see also Marine Midland Bank, N.A. v. United States*, 11 F.3d 1119, 1126 (2nd Cir. 1993) (holding that with respect to seizure of bank accounts, "[t]he government must be able to show a nexus between the illegal conduct and the seized property. The government is not required to link a bank account to a particular illegal transaction."). Because the magistrate had sufficient evidence to find probable cause that the account was connected to illegal conduct, we find that the seizure warrant was proper.

Upon review of the presentence investigation report, the trial transcript, and the sentencing transcript, and upon consideration of the briefs of the parties, we find no reversible error.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	)	
PLAINTIFF,	)	No: 1:99-CR-545 (19)(20) CC
VS.	)	
DAVID MORDEHAI AND	)	Atlanta, Georgia
	)	May 22, 2001
ITZHAK SHALOM,	)	9:40 a.m.
DEFENDANTS.	)	

VOLUME 10

TRANSCRIPT OF SENTENCING HEARING
PROCEEDINGS BEFORE THE HONORABLE
CLARENCE COOPER, UNITED STATES
DISTRICT JUDGE

APPEARANCES:

For The Plaintiff:	Office Of The U.S. Attorney By: William McKinnon, AUSA
For Defendant Mordehai:	Jeffrey L. Berhold, Esq. A. Jeff Ifrah, Esq.
For Defendant Shalom:	Jerome J. Froelich, Esq.

Also Present: Valerie Vollrath, USPO
Michael Smith, USPO

Court Reporter: Therese J. Vesel, R.D.R.
1714 U.S. Courthouse
75 Spring Street, S.W. Box 2
Atlanta, Georgia 30303-3361
(404) 215-1546

Page 1094:

(In open court at 11:44 a.m.)

The Court: You may be seated.

Let the record reflect the following:

Having heard oral argument on the 14-level enhancement as well as the amount of the loss pursuant to paragraph 71 of the presentence report, the court hereby resolves this issue in favor of the government and against the defendant because the government did establish by a preponderance of the evidence during the trial that the acts which the defendant was acquitted were committed by the defendant from May 1998 through August 1999.

As to the amount of loss that is reflected in the presentence report, that the defendant sent approximately 800 thousand dollars to the coconspirators for stolen merchandise and this amount represented half the retail value of the stolen items; therefore, the

original retail value would have exceeded $1500.

We are now ready to move to the next guideline issue.

Mr. Smith: Excuse me, Your Honor. That is 1.5 million.

Page 1106:

The Court: Let me see those.

As to this issue, let the record reflect the following:

Given the period of time as well as the regularity with which the defendant purchased stolen goods pursuant to this conspiracy, the court is going to resolve this issue in favor of the government and against the defendant because the government did establish by a preponderance of the evidence at trial that the defendant was in the business of receiving and selling stolen goods; therefore, the court will allow the four-level enhancement to stand.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-13011-EE

United States of America,

Plaintiff-Appellee,

versus

Itzhak Shalom

Defendant-Appellant.

On Appeal from the United States District Court

For the Northern District of Georgia

Before ANDERSON, Chief Judge, WILSON and FAY, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Itzhak Shalom is DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay

UNITED STATES CIRCUIT JUDGE

Dated: June 18, 2002

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-13011-EE

United States of America,

Plaintiff-Appellee,

versus

Itzhak Shalom

Defendant-Appellant.

On Appeal from the United States District Court

For the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, _____ F.2d ____).

Before ANDERSON, Chief Judge, WILSON and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure), the Petition(s) for Rearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
UNITED STATES CIRCUIT JUDGE

Dated: June 18, 2002

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-13958-EE

United States of America,

Plaintiff-Appellee,

versus

David, Mordehai, [sic]

Defendant-Appellant.

On Appeal from the United States District Court

For the Northern District of Georgia

Before ANDERSON, Chief Judge, WILSON and FAY, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, David Mordehai Shalom [sic] is DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
UNITED STATES CIRCUIT JUDGE

Dated: June 18, 2002

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-13958-EE

United States of America,

Plaintiff-Appellee,

versus

David, Mordehai, [sic]

Defendant-Appellant.

On Appeal from the United States District Court

For the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, _____ F.2d ____).

Before ANDERSON, Chief Judge, WILSON and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure), the Petition(s) for Rearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
UNITED STATES CIRCUIT JUDGE

Dated: June 18, 2002

Supreme Court, U.S.
FILED
OCT 7 2002
OFFICE OF THE CLERK

No. 02-440

In The
Supreme Court of the United States

ITZHAK SHALOM and DAVID MORDEHAI,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is the preeminent bar association in the United States advancing the mission of criminal defense lawyers to ensure justice for persons accused of crime or other misconduct. Founded in 1958, NACDL has over 10,000 direct members and over 80 state and local affiliate organizations with 28,000 members. NACDL's members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges. The American Bar Association recognizes NACDL as an affiliate organization and grants it full representation in its House of Delegates.

NACDL promotes study and research about issues of criminal justice. It also tries to promote fairness in criminal proceedings. In furtherance of that objective, over the last decade NACDL has filed some ten *amicus* briefs per year with this Court.

NACDL members regularly litigate cases involving the issues presented here -- whether, and to what extent, acquitted conduct may increase a sentence -- and have an intimate knowledge, based on practical experience, of the pervasive impact of these issues on criminal justice in the federal courts.

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1 Pursuant to S.Ct. Rule 37.6, counsel certifies that no counsel for any party authored any part of this brief; and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of this brief.

Pursuant to S.Ct. Rule 29.6 on Corporate Disclosure Statements, NACDL is a nonprofit corporation. It has no parent corporation; it is not a publicly held corporation; nor does a publicly held company own 10% or more of its stock.

The parties have consented to the filing of this *amicus* brief on petitioners' behalf. The letters of consent are filed with this brief.

SUMMARY OF ARGUMENT

This case presents constitutional issues of enormous importance. Petitioners, although acquitted by a jury on 17 of 19 counts of transporting stolen goods in interstate commerce (18 U.S.C. § 2314), were sentenced exactly as if the jury had found them guilty on all 19 counts. The district court at sentencing found that the prosecution had established "by a preponderance of the evidence during the trial" that petitioners had committed the acts alleged in the 17 counts on which they stood acquitted. With respect to the two substantive counts (and the related conspiracy count) on which petitioners were found guilty, the value of the goods was under $40,000. But in calculating the total loss under *Sentencing Guidelines* § 2B1.1.(b)(1), the district court added up the value of the goods on all 19 stolen-property counts. This yielded a "total loss" exceeding 1.5 million dollars and a stunning increase in the sentence of incarceration.

This result is inconsistent with recent decisions of this Court prohibiting punishment "exceeding the maximum [the defendant] would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi v. New Jersey,* 530 U.S. 466, 483 (2000). *See Harris v. United States*, 122 S.Ct. 2406, 2417 (2002); *Ring v. Arizona*, 122 S.Ct. 2428 (2002). Here, the sentencing court not only went beyond the facts reflected in the jury's verdict, but actually made and relied on findings contrary to that verdict.

Additionally, because this led to a dramatic increase in the sentence, the facts here present in stark relief the issue explicitly reserved by this Court in *United States v. Watts*, 519 U.S. 148, 156 (1997) -- "whether, in extreme

circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence." This Court's more recent decisions in *Apprendi, Harris* and *Ring*, we submit, have eroded the majority's *per curiam* holding in *Watts*. And even the majority in *Watts* made clear that its decision did not address the sort of "exceptional circumstances" (519 U.S. at 157) presented here.

The issues presented in this case are manifestly important and recurring.

ARGUMENT

We agree with the reasons for granting the writ as set forth in the petition for certiorari, and add only a few brief comments on the vast importance of this case to criminal justice.

1. The issues here loom large in most, if not all, criminal cases. The prevalent practice of prosecutors, for obvious strategic reasons, is to have indictments drawn up with multiple counts. When these cases go to trial and the jury finds guilt on one or more counts and acquits on one or more counts, the issues raised here will likely rear their heads. These issues can and will recur whenever the prosecutor, moved by a sense of duty or frustrated by partial acquittals, asks the sentencing judge to consider the acquitted conduct; or the Department of Probation raises those issues in the Presentence Report; or the sentencing court decides to raise them *sua sponte*. As Justice Kennedy said of the issue decided summarily in *Watts*, the question is "of recurrent importance in hundreds of sentencing proceedings in the federal criminal system." 519 U.S. at 170 (dissenting opinion).

2. The issue reserved in *Watts* and so clearly presented here, where the acquitted conduct had a draconian impact on the sentence, will also recur.

3. The threat of enhancing a sentence based on allegations rejected by the jury will further deter defendants from going to trial, particularly if, as here, the law allows radical increases on a mere "preponderance of the evidence" standard. The *Federal Sentencing Guidelines*, effective as of November 1, 1987, have already altered the adversarial balance of power in criminal cases. Among other things, the *Guidelines* greatly reduced the percentage of cases where a defendant chooses to risk trial. In 1986, the last year before the *Guidelines* regime commenced, 16% of federal defendants against whom charges were not dismissed went to trial. In 2001 only 6% did so, a drop of 61%.[2] *Sourcebook of Criminal Justice Statistics Online*, Table 5.21 (visited Sept. 20, 2002) <http://www.albany.edu/sourcebook/1995/pdf/t521.pdf>.

As the largest organization of criminal defense lawyers, we foresee an added drop in the

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2 In the intervening years, there has been a smooth downward trend in these percentages:

1986	1987	1988	1989	1990	1991	1992	1993
16%	15%	16%	16%	16%	15%	14%	12%

1994	1995	1996	1997	1998	1999	2000	2001
11%	10%	9%	8%	8%	6%	6%	6%

Id.

percentage of defendants willing to go to trial if the law applied by the lower courts in this case is allowed to stand.

4. The sentencing doctrine applied here inevitably embitters defendants toward the criminal justice system. A result so seemingly unfair, so counterintuitive, can never be digested by the individual defendant who experiences it. And the defense lawyer is left with the impossible task of explaining to his client that, despite the jury's acquittal on multiple counts, there is no difference for sentencing purposes -- the thing that counts the most -- between an acquittal and a guilty verdict.

Recognizing this disquieting anomaly, some Justices of this Court have recently expressed their growing concern over the disturbing results in cases less extreme, in our view, than this one. *United States v. Watts*, 519 U.S. at 164 ("In my judgment neither our prior cases nor the text of the statute warrants this perverse result") (Stevens, J., dissenting); *see Ring v. Arizona*, 122 S.Ct. at 2445 ("accelerating propensity" to "increase punishment beyond what is authorized by the jury's verdict" shows that "our people's traditional belief in the right of trial by jury is in perilous decline") (Scalia, J., concurring). *See also, United States v. Watts*, 519 U.S. at 163-64, n.3. (and cases cited therein). As the Second Circuit stated in *United States v. Conception*, 983 F.2d 369, 389, 396 (C.A.2, 1992), "A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal" (Newman, C.J., concurring).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 2, 2002